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No. 87-687

In the Supreme Court
OF THE
United States

OCTOBER TERM 1987

SESSIONS TANK LINERS, INC. d/b/a
SOUTHWEST TANK LINERS, INC.,
Petitioner and Cross-Respondent,

vs.

JOOR MANUFACTURING, INC.,
Respondent and Cross-Petitioner.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INTRODUCTION

This case raises novel questions of law and economic policy relating to the antitrust laws, and additionally requires the balancing of the interests favoring competitive markets under the Sherman Act with those interests favoring a free marketplace of ideas under the First Amendment. These questions were addressed and correctly decided by the Court of Appeals for the Ninth Circuit in *Sessions v. Joor.*

While the general issues raised in the Petition are ripe for review by this Court, the single question presented in the Petition is overly broad and attempts to posture

Sessions v. Joor, 827 F.2d 458 (9th Cir. 1987) as identical to *Indian Head, Inc. v. Allied Tube & Conduit Corp.*, 817 F.2d 938 (2nd Cir. 1987), *cert. granted*, 56 U.S.L.W. 3202 (U.S. Oct. 5, 1987) (No. 87-157).

In fact, *Indian Head* and *Sessions* are very different cases. *Indian Head* presents one focused question of whether immunity is proper where the petitioning tactics are found to subvert the association rules. This question is not presented by the facts in *Sessions*. A determination of that issue alone does not require the granting of the *Sessions* petition.

Indian Head involved a private code-making association with voting membership made primarily of self-interested private parties. These parties could and did recruit additional voters by simply paying dues and arranging for the votes to attend particular meetings.

In *Sessions*, voting membership of the WFCA was limited to elected or appointed public safety officials. Interested private parties could attend meetings and recruit additional supporters, but could not "stack" the actual vote.

Indian Head involved an advocacy supported by facts, but not necessarily governed by the facts. The "voters" assembled by the various sides of the battle were hired bodies and were not informed, active advocates.

In *Sessions*, the positions for and against tank lining were presented by informed advocates to the voting membership composed exclusively of public safety officials. That independent voting membership made the decision, not the faction hiring the most dues-paying bodies in attendance.

Respondent separately filed a Cross-Petition for Certiorari on November 30, 1987.

In that Cross-Petition, Joor stated that "... the primary question uniquely addressed by the Court of Appeals in *Sessions* was properly decided. Review by this Court is not necessary to correct any error by the Ninth Circuit.

"However, the opinion in *Indian Head* creates an uncertainty which may best be addressed by a review of both cases by this Court."

STATEMENT OF THE CASE

The facts underlying this Petition are well stated in the opinion of the Court of Appeals. (App. A, pp. a5 -a7 to Joor's Cross-Petition.) That account is quoted here for convenience.

"Joor manufactures metal tanks used for the underground storage of hazardous fluids, principally gasoline. Sessions repairs leaks in these tanks by puncturing them while still underground and coating their inner surface with an epoxy lining. Removing a tank to repair it aboveground is so costly that customers will ordinarily buy new tanks if this underground lining process is not available. Thus appellant's repairs compete directly with Joor's sales.

"According to Sessions, tank lining has been in successful use for some thirty years. In 1980, however, demand for appellant's service began to decline, particularly in California. At the same time, fire department officials in various California localities began denying Sessions the permit necessary to perform its work.

"The reason, Sessions alleges, has its source in a proposed amendment to the WFCA's Uniform Fire Code (the Code) a model fire safety code highly influential in

the western states.[1] The WFCA is a nonprofit, voluntary membership organization established in 1891. Although it has no official governmental status, *the WFCA limits its voting membership exclusively to public officials, most of whom are involved in enforcing fire safety regulations in their respective jurisdictions.* The Code has no legal force until local governments choose to adopt or enforce its provisions. [Emphasis added.]

"In 1978 the WFCA created a subcommittee to revise Article 79 of the Code, which deals with the use and storage of inflammable fluids.[2] One of the Article 799

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[1]The record does not make clear exactly which states, counties or municipalities have enacted the Code into law, or to what extent local legislatures have deviated from its terms when adopting it. According to the WFCA, the Code "has been adopted in a majority of the counties, cities and other political subdivisions in the ten western United States (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Utah and Washington) and is widely adopted in the thirteen southwestern) and mid-western states." Brief of the WFCA, et al., amici curiae, at 5. In addition, local fire officials may enforce Code provisions or standards even when their respective localities have not enacted these provisons or standards into law.

[2]The WFCA revises the Code according to the following procedures. An ad hoc subcommittee is established to consider particular issues. Representatives of private industry are often invited to serve thereon. At the time of the events in question, such private industry members had full voting powers within the subcommittee on which they serve. (The WFCA has now changed its rules so that private industry representatives no longer have voting power even at the subcommittee level.) If a subcommittee votes to propose an amendment to the Code, the proposal is referred to the WFCA's standing Code Committee, which publishes a notice in two national trade journals and then holds meetings on the proposed amendment. Anyone may attend these hearings, speak and present evidence, but only active WFCA members — no private industry representatives — may vote. After the hearings, both the original proposal and the Code Committee recommendation are again published in the

subcommittee's tasks was to develop safety standards for the underground repair of storage tanks. The alleged safety problem posed by underground repair lies in the possibility that corrosion — which might have caused the leakage — will go undetected. Sessions' epoxy lining stops leaks but does not strengthen the tank's walls. Joor insists that aboveground inspection is necessary to ascertain whether the leaking tank's walls can continue to withstand ground pressure.

"Joor's president, Howard Robbins, became a member of the Article 79 subcommittee and there argued strenuously that the underground tank lining process should be completely prohibited. On March 17, 1981, at a subcommittee meeting, Robbins moved to amend the Code to require leaking tanks to be removed from the ground. The proposed amendment was calculated to prevent Sessions and similar companies from repairing tanks. Removing a tank from the ground prior to the tank lining process would destroy the cost advantage of that process. Robbins' motion carried unanimously.

"Neither Sessions nor any other firm in the tank lining field had a voting representative on the Article 79 subcommittee. However, Sessions was not barred entirely from participating in the subcommittee's deliberations. It was permitted to submit materials in the subcommittee and to have a representative offer on oral defense of its process at the March 17 meeting. Subsequently, representatives for Sessions and other tank lining companies presented arguments and evidence at Code Committee meetings and at the WFCA annual conference. Nonethe-

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trade journals. Finally, at the WFCA annual conference, where once more anyone may participate but only WFCA members may vote, the entire body of the WFCA approves or rejects the proposed amendment.

less, these two bodies both ratified the subcommittee's amendment, which thereby became part of the Code in 1982.

"Sessions brought suit under sections 1 and 2 of the Sherman Act, alleging that Joor combined with other tank manufacturing interests to procedure an unreasonable restraint of trade, and that Joor was attempting to monopolize the relevant market. Sessions further accused Robbins of making misrepresentations to fire officials inside and outside the WFCA, of conspiring with the same, and of denying Sessions access to the Article 79 subcommittee."

REASONS FOR DENYING THE WRIT

The broad issue of antitrust immunity for petitioning activities before private code-making associations is one of first impressions before this Court.

In its Petition, Sessions requests that its petition be granted and that the *Sessions* case be consolidated with *Indian Head* as they present the same question of law to be resolved.

Respondent believes that this is a misrepresentation of the record and an inaccurate characterization of the facts below and the question of law actually raised by the *Sessions* case.

Indian Head presents one focused question of whether immunity is proper where the petitioning tactics are found to subvert the association rules. This question is not presented by the facts in *Sessions*. The determination of that issue alone does not require the granting of the *Sessions* petition, and for that reason Respondent opposes the *Sessions* petition. There obviously is a tension between the holdings of *Indian Head* and *Sessions*, but should this

Court elect to resolve only the focused question presented squarely by *Indian Head*, there is no need to grant the *Sessions* petition.

Should this Court elect to review the questions uniquely raised by *Sessions*, Respondent believes that those are accurately framed by the questions presented in the Cross-Petition for Writ of Certiorari served on November 30, 1987.

Neither Respondent nor Petitioner contest the legal and economic significance of the issues raised by both *Indian Head* and *Sessions*. The only disagreement is that Respondent believes that participants in the code-making process should know in the most clear and least ambiguous way possible that this activity is to be encouraged and should not wrongfully be chilled by the potential application of inappropriate or ambiguous application of potential antitrust liability.

Such result is best reached by an opinion of this Court squarely addressing the individual and discreet issues raised by *Indian Head* and *Sessions* and not through the confusion and oversimplification advanced by Petitioner.

CONCLUSION

For the reasons set forth above, the Petition should be denied.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On February 1, 1988, I served the within Opposition to Petition for Writ of Certiorari in re: "Sessions Tank Liners, Inc. vs. Joor Manufacturing, Inc." in the United States Supreme Court, October Term 1987, No. 87-687;

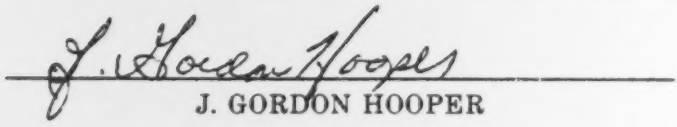
On the Parties in said action, by placing Three copies, thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Maxwell M. Blecher Esq.
Blecher & Collins
611 W 6th Street
28th Floor
Los Angeles, California 90017

All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on February 1, 1988, at Los Angeles, California



J. GORDON HOOPER